4. A person of defective senses is bound to the diligent use of such senses as he has; and if his defects are such as to deprive him of material aids to safety, which ordinary persons have, conduct may be negligent in him which would not be so in ordinary persons.

5. In all cases the question of ordinary care is for the jury.

A. DAVIS SMITH.

Hartford, Conn.

RECENT ENGLISH DECISIONS.

House of Lords.

KENDALL ET AL. *v.* HAMILTON.

The plaintiffs recovered judgment for breach of a contract, against W. and M., who were carrying on business in partnership as W., M. & Co. W. and M. became insolvent, and the judgment was never satisfied. The plaintiffs afterwards discovered that H. was jointly interested in the contract which they had entered into with W. and M., and they brought a fresh action against H.

Held (Lord PENZANCE dissenting), That the judgment recovered by the plaintiffs against W. and M., though unsatisfied, was a bar to their action against H., and that the Judicature Acts have made no change in the law on this subject.

King v. *Hoare*, 13 M. & W. 494, followed and approved.

Per Earl CAIRNS, C.—W. and M. were in the position of agents for W., M. and H., as undisclosed principals, and the recovery of judgment against the agents precluded the plaintiffs from afterwards suing the principals.

APPEAL by the plaintiffs against the judgment of the Court of Appeals, reported Law Rep., 3 C. P. Div. 403.

The facts of the case are fully stated in the judgment delivered by the Lord Chancellor.

The case was tried without a jury before HUDDLESTON, B., who entered judgment for the plaintiffs; but this judgment was, on the 23d of July 1878, reversed by the Court of Appeals.

The plaintiffs appealed to this House.

Kay, Q. C., and *Bowen* (*Watkin Williams*, Q. C., with them), for the appellants.

Benjamin, Q. C., and *Rigby*, for the respondent.

Earl CAIRNS, C.—In the arguments before your lordships, and in the judgments in the court below, the facts of this case were presented in this form: it was said that a debt was due to the appellants from Wilson, McLay & Co., and from the present respondent; that the debt was a partnership debt due from the three jointly; that the appellants sued Wilson and McLay for the debt, not then knowing that it was contracted by the respondent jointly with them; that Wilson and McLay did not plead in abatement, or otherwise object to the non-joinder of the respondent; that judgment was obtained by the appellants against Wilson and McLay, which judgment was; by reason of their insolvency, never satisfied; and that the appellants, on discovering the respondent's interest, brought an action against him for the debt. Two questions thereupon arose—first, was the judgment against Wilson and McLay, even though unsatisfied, a bar to the action against the respondent, Hamilton, according to the principles hitherto prevailing in the courts of common law? Secondly, was there not a doctrine in courts of equity that all partnership debts are several as well as joint, and if so, ought not that doctrine to be applied as if the debt in this case was the sole debt of Hamilton, so as to prevent him from setting up in the action in which he is defendant, the judgment recovered against Wilson and McLay? I will express to your lordships what my opinion would be upon these questions if they had to be determined in this case; but I would first suggest that the facts, when properly considered, seem to make it doubtful whether these questions really arise, and whether the case should not be determined upon somewhat different considerations.

Between 1870 and 1874, the appellants were carrying on business in London as merchants. Wilson, McLay & Co., who were carrying on business at Glasgow and London, undertook some speculative shipments of old iron, and the appellants agreed to provide them with the necessary funds through the acceptance and discounting of bills of exchange. The respondent was, in fact, interested in these shipments, though this fact was then unknown to the appellants. He had agreed that the shipments should be for the joint benefit of himself, and Wilson and McLay, the financial arrangements being managed by them. Therefore, Wilson and McLay were, in reality, agents authorized to borrow money for the undisclosed principals—Wilson, McLay, Hamilton. The persons

advancing the money would have the right, on becoming aware of Hamilton's interest, to sue all three as principals on the contract, and if Hamilton were sued alone, he could plead in abatement the non-joinder of Hamilton and McLay. The persons advancing the money would also have the right to treat Wilson and McLay as the principals, and to sue them alone; and in such an action Wilson and McLay would have no right to object to the non-joinder of Hamilton. In the present case the transactions resulted in a large sum of money becoming due to the appellants, for which they sued Wilson and McLay, as they were entitled to do, whether they knew of Hamilton's interest or not. It is true that they could at any time before judgment have discontinued that action, and brought a fresh one against all three principals; but if they did not do so, Wilson and McLay could not have contended that they were not the persons to be sued. The action went on, and resulted in the recovery of judgment against Wilson and McLay.

I take it to be clear, that when an agent contracts in his own name for an undisclosed principal, the person with whom he contracts may sue the agent, or may sue the principal; but if he sues the agent and recovers judgment, he cannot afterwards sue the principal, even though the judgment against the agent does not result in the satisfaction of the debt. If any authority for this proposition is required, *Priestley* v. *Fernie*, 3 H. & C. 977, may be mentioned, but the reasons for it are obvious; it would be contrary to every principle of justice, that the creditor who had seen, and known, and dealt with, and given credit to the agent, should be driven to sue the principal if he does not wish to do so; and, on the other hand, it would be equally unjust that the creditor should be prevented from suing the principal, if he wishes to do so, when he discovers who has really had the benefit; but it would be no less contrary to justice, that the creditor should be able to sue, first the agent and then the principal, when it was never the intention of the parties that he should so. Again, if an action were brought and judgment were recovered against the agent, the agent would have a right of action for indemnity against his principal; while, if the principal were liable to be sued, he would be vexed with a double action. Moreover, if actions could be brought and judgments recovered, first against the agent, and afterwards against the principal, you would have two judgments in existence for the same debt or cause of action; they would not necessarily be for

the same amount, and there might be recoveries had, or liens and charges created, by means of both, and upon the face of the judgment there would be no means of showing that they were both for the same cause of action, and that satisfaction of one would be satisfaction of both. I think that the appellants, when they sued Wilson and McLay, and obtained a judgment against them, adopted a course which was clearly within their powers, and to which Wilson and McLay could have made no opposition, and that, by taking this course, they exhausted their right of action, not necessarily by any election between two courses open to them (which would imply that, in order to an election, the fact of both courses being open was known to them), but because the right of action which they pursued could not, after judgment obtained, co-exist with a right of action on the same facts against another person. If Wilson and McLay had been the agents, and Hamilton had been the undisclosed principal, the case could hardly have admitted of a doubt; and I think it makes no difference that Wilson and McLay were the agents, while Wilson, McLay and Hamilton were the undisclosed principals.

If the view which I have taken of the facts and the law applicable to them is correct, it is not necessary to look upon Wilson, McLay and Hamilton as co-contractors; but, if they are looked at in that light, I must say that the case of *King* v. *Hoare* appears to me to have been decided upon satisfactory grounds. It is the right of persons jointly liable to pay a debt, to insist upon being sued together. If there are three people so liable, and the creditor sues two of them, and those two make no objection, the creditor may recover judgment against the two; but if he afterwards sues the third person, the latter may justly contend that the three should be sued together. It is no answer to him to say that the other two had been sued and had made no objection, for the objection is his, and not that of the other two; nor is it any answer to him to say that whatever he pays on the judgment against himself he may be allowed in account with the others, because he may fairly require, with a view to his right of account or contribution, to have the identity and the amount of the debt constituted and declared in one and the same judgment with his co-contractors. If then, when the third debtor is sued and requires that the other two should be joined as parties, the creditor has to admit that he cannot join the other two, because he has already recovered judg-

ment against them for the same cause of action, that is equivalent to saying that he has disabled himself from suing the third person in the way in which the latter has a right to be sued.

It has been suggested that, assuming *King* v. *Hoare* to have been rightly decided, the law as there laid down has been altered by the Judicature Acts, and by the abolition of the plea in abatement. I cannot agree in that suggestion. I do not think that the Judicature Acts have changed what was formerly a joint right of action into a right of bringing several and separate actions. Although the form of objecting, by means of a plea in abatement, to the non-joinder of a defendant who ought to have been included in the action is abolished, I conceive that the application to have the person so omitted included as a defendant ought to be granted or refused upon the same principles as those on which a plea in abatement would have succeeded or failed. In this case the judgment was obtained before those acts came into operation, and if that judgment became pleadable in the action against Hamilton, I cannot see how he can be deprived of his defence by such operation. If that is Hamilton's position, I cannot agree that the doctrines of equity with regard to partnership debts make any difference. No doubt in many cases and text-books we find the expression that a partnership debt is in equity joint and several; but that is a compendious expression, and must be interpreted with reference to what were the functions of a court of equity as to partnership debts. The only interposition of the court with regard to such debts took place in the administration of the assets either of the partnership or of a deceased partner. When a member of a partnership died, the debts became in the eye of a court of law the debts of the survivors; but on the other hand the survivors had in a court of equity the right to say, as against the estate of the deceased partner, that his representatives should not withdraw any part of the partnership property until all the debts were paid or provided for. If a court of equity were administering the assets of a deceased partner, it would ascertain his liabilities to the partnership, and for this purpose it would ascertain the debts due from the firm at the time of his death. From this the transition was easy to giving the creditors of the partnership a direct right, through the surviving partners, of coming for payment against the assets of the deceased partner; and from this again the transition was easy to the expression that partnership debts, in the view of a

court of equity, are joint and several, not meaning that the court altered a legal contract, but that in order, before distributing assets, to administer all the equities existing with regard to them, the court would go behind the legal doctrine that a partnership debt survives against the surviving partners only, and would give the creditors the benefit of the equity which the surviving partners might have insisted upon. This is clearly expressed by Lord ELDON in *Ex parte Williams*, 11 Ves. 3, and if I read his expressions it will be unnecessary to comment upon the numerous cases which have been cited during the argument. Lord ELDON said: "Among partners clear equities subsist, amounting to something like lien; the property is joint, the debts and credits are jointly due, they have equities to discharge each of them from liability, and then to divide the surplus according to their proportions; * * * but while they remain solvent, and the partnership is going on, the creditor has no equity against the effects of the partnership, but when he has got them into his hands, he has them by force of the execution, as the fruit of the judgment, clearly not in respect of any interest he had in the partnership effects while he was a mere creditor, not seeking to substantiate or create an interest by suit. There are various ways of dissolving a partnership: effluxion of time, the death of one partner, the bankruptcy of one, which operates like death, or, as in this instance, a dry, naked agreement that the partnership shall be dissolved. In no one of these cases can it be said that to all intents and purposes the partnership is dissolved, for the connection still remains until the affairs are wound up. The representatives of a deceased partner, or the assignees of a bankrupt partner, are not strictly partners with the survivor or the solvent partner; but still in either of these cases the community of interest remains that is necessary until the affairs are wound up, and that requires that what was partnership property before shall continue for the purpose of a distribution, not as the rights of the creditors, but as the rights of the partners themselves, require; and it is through the operation of administering the equities, as between the partners themselves, that the creditors have that opportunity, as in the case of death it is the equity of the deceased partner that enables the creditors to bring forward the distribution." I should imagine that the words "bring forward" are inaccurately reported, but it obviously means "assist" the distribution.

If then this case is to be looked at as one where judgment has been recovered against two out of three partners for a partnership debt, it seems to me that, on the principle of *King* v. *Hoare*, the judgment would be a bar at law to a subsequent action against the third partner; and I know of no principle upon which a court of equity could prevent that result by holding the debt to be several. I am of opinion, in any view of the case, that the judgment of the Court of Appeal was correct, and I propose to your lordships to dismiss the appeal with costs.

Lord PENZANCE.—The appellants advanced a large sum to the respondent in conjunction with two other persons. The respondent had the full benefit of this advance to the extent of his interest in the joint adventure, and, therefore, the a pellants have acquired a legal, equitable and moral right to payment from him. The sole defence of the claim of the appellants is this: that in accordance with a rule established about twenty-five years ago in *King* v. *Hoare*, which never received the sanction of an appellate court, the appellants, by suing two out of the three partners, have lost their remedy against the third. Before examining the technical grounds upon which this rule is based, I cannot forbear asking myself how far it is consistent with justice. What justice is there in saying that when three persons are each individually liable for a debt, an unsatisfied judgment against two of them should extinguish the liability of the third? The most that can be said is that, by bringing two actions, additional costs have been incurred. The joint contractors might reasonably insist that the plaintiffs should not pursue their remedies in a vexatious manner, and if two actions are without good reason brought, when one would suffice, it may be that the extent of extra costs invoked should be borne by the plaintiffs; but that is a very different thing from the extinction of the defendant's liability, which may be equivalent to the plaintiffs' total loss of the debt. Even this consideration as to unnecessary costs can only apply in a case where the plaintiff has, with his eyes open, chosen to sue two partners first and the third one afterwards. It cannot apply to a case like this, where the two first partners concealed the fact that the third was interested in the adventure, and the appellants were ignorant of that fact. That circumstance removes all blame from the appellants, and all semblance of justice from the defence now set up;

and no argument has been adduced to show that the respondent was prejudiced by the appellants' conduct, or that anything has occurred to render him, in reason or justice, less liable to pay the debt than he was at first. In this state of things I feel unwilling that your lordships should confer the sanction of the highest Court of Appeal upon a rule of procedure which, without affecting to assert any just rights on the part of the defendant, denies the aid of the law to enforce those of the plaintiff. Procedure is only the machinery of the law, the channel whereby it is administered, and the means whereby justice is reached; and it departs from its proper office when it is allowed to obstruct and even extinguish legal rights, instead of facilitating them, and thus governs where it ought to subserve.

With these observations I proceed to consider the case of *King* v. *Hoare*. The proposition that a cause of action which has never been before the court at all has become a *res judicata* is a startling one. The present plaintiffs have never before sued the present defendant, or made any attempt to enforce the liability which he now asserts, and yet they are met at the threshold of their suit with the plea that the matter between them and the defendant has already become a *res judicata*. The doctrine of merger is quite intelligible. Where a security of one kind or nature has been superseded by another of a higher kind or nature, it is reasonable to insist that the party seeking redress should rest only upon the latter. So when what was once a mere right of action has become a judgment of a court of record, the judgment is a bar to the original cause of action, for the reason given in *King* v. *Hoare* —namely, that "the judgment is a bar to the original cause of action, because it is thereby reduced to a certainty, and the object of the suit attained, so far as it can be at that stage, and it would be useless and vexatious to subject the defendant to another suit for the purpose of attaining the same result; hence the legal maxim —*transit in rem judicatam;* the cause of action is changed into matter of record, which is of a higher nature, and the inferior remedy is merged in the higher." This reasoning is satisfactory on the assumption that the cause of action sued upon is the same as that upon which judgment has been already obtained; but when a man delivers goods or lends money to two or more partners, the law implies a joint promise, the effect of which, as distinguished from a joint and several promise, is this: that in case of death the

debt can be enforced only against the survivor. If the further legal effect of such a joint promise were this, that it could not constitute a cause of action against only one of the contractors, then the reasoning in *King* v. *Hoare* would be unquestionable, for there could be only one cause of action resulting, which would be a joint one, and the cause of action, having been advanced to a judgment, could not support a second action. But the cases do not establish that a joint promise has this effect. If a man who contracts with two partners chooses to sue one only, and to allege a promise by that one alone, he has a good cause of action which cannot be defeated by the defendant's proving that the promise was made by him jointly with another person. If a joint promise by two persons were so different in law from a promise by only one person that it could not be held to include a promise to each, and if it did not in point of law give rise to a separate cause of action against one, the defendant in such a case ought to be able to defeat the plaintiffs claim by showing that the promise sued upon was not the promise made, and that the latter did not give rise to a separate claim. That was precisely what the defendant sought to do in *Rice* v. *Shute*. There the plaintiff had been nonsuited upon the ground that an allegation of a separate promise by the defendant was not supported by a proof of a joint promise by the defendant and another, and that there was therefore a fatal variance. The nonsuit was set aside, and Lord MANSFIELD'S language is instructive. He said: "To be sure, a distinction is to be found in the books between torts and assumpsits, that in torts all the trespassers need not be made parties, but in actions upon contract every party must be made a defendant; many nonsuits, much vexation and great hindrance to justice, have been occasioned by this distinction; it must have been introduced originally from the semblance of convenience, that there might be one judgment against all who were liable to the plaintiff's demand; but experience shows that convenience, as well as justice, lies the other way; all contracts with partners are joint and several, every partner is liable to pay the whole; in what proportion the others should contribute is a matter merely among themselves; * * * it is cruel to turn a creditor round and make him pay the whole costs of a nonsuit in favor of the defendant, who is certainly liable to pay his whole demand, and who is not injured by another partner not being made defendant, because what he pays he must have credit for in account with his

partnership,* * * the defendant ought to plead in abatement; he must then say who the partners are; if the defendant does not take advantage of it at the beginning of the suit and plead it in abatement it is a waiver of the objection; he ought not to be permitted to lie by, and put the plaintiff to the delay and expense of a trial, and then set up a plea not founded on the merits of the cause, but on the form of the proceeding, * * * no injustice is done to the defendant by allowing the plaintiff to recover, but great injustice is done to the plaintiff by allowing the nonsuit to stand." Therefore it is clear that, though the defendant in such a case may, by means of a plea in abatement, compel the plaintiff to discontinue his action and bring a fresh one against both, there is yet a good cause of action against him, which will sustain a verdict and judgment if that course is not followed. It might happen that in the case of a joint promise the plaintiff could bring two actions *pari passu*, one against each joint contractor, and if neither of them chooses to plead in abatement (which would not get rid of their liability) both actions might go on to judgment, and in neither of them, though the fact of the promise being joint only, and not joint and several, appeared on the record, could the judgment be declared to be erroneous. Now, if two judgments against two different defendants can be supported upon one joint promise, does not that show that in reality two causes of action are involved in the breach of such a promise? If so, the principle upon which *King* v. *Hoare* was decided cannot be sustained, since it rests upon the assertion that the joint promise gives rise to only one cause of action. The creditor's real position appears to be this: he has a cause of action against each debtor separately, or against both together, subject to a plea in abatement. That plea affirms (not that the plaintiff has no cause of action, or that his cause of action is barred, but) that the plaintiff is bound to pursue his remedy in another form of proceeding. That plea is thus described in Chitty on Pleading, 7th ed., p. 462: "Whenever the subject-matter of the plea or defence is that the plaintiff cannot maintain any action at any time, whether present or future, in respect of the supposed cause of action, it may, and usually must, be pleaded in bar; but matter which merely defeats the present proceeding, and does not show that the plaintiff is for ever concluded, should, in general, be pleaded in abatement (from the French *abattre*); the criterion or leading distinction between a plea in abatement and a plea at bar

is that the former must not only point out the plaintiff's error, but must show him how it may be corrected, and furnish him with materials for avoiding the same mistake in another suit in regard to the same cause of action, or, in technical language, 'must give the plaintiff a better writ.'" By such a plea a joint contractor sued alone could insist upon the plaintiff bringing his action against both; but it is obvious that such a right can only be exercised, on the part of both, by the one who is first sued. If one of the two allows his liability to be enforced in a separate action, it is too late for the other, if sued, to plead in abatement, for he cannot "give the plaintiff a better writ." The conduct of the co-contractor, in allowing the plaintiff to go on to judgment against him alone, has rendered a joint action against the two impossible; the plaintiff has no longer a joint promise upon which to sue, the promise of the one having passed into *res judicata;* and therefore the technical grounds upon which *King* v. *Hoare* is founded are, in my opinion, neither sufficient nor satisfactory. Moreover, when the Court of Queen's Bench, in *Rice* v. *Shute*, determined, contrary to the rule previously established, that a joint promise of several might give rise to a separate action against one only, they destroyed the basis upon which *King* v. *Hoare* is founded—namely, that the second action is brought for the same cause as the first.

Passing from mere technical views, and regarding this rule of procedure in the light of convenience and fitness to promote the ends of justice, there is even less to be said for it. The rule is unbending and indiscriminate. It permits no exception in a case where one or more of several partners may be abroad, in which case the plaintiff must either postpone his action till they are all within the jurisdiction, or bring it at once at the cost of losing the responsibility of those who are in the country; and there is no exception possible for a case like the present, for the plaintiff could not sue all the partners together, being ignorant that the defendant was one of them. In the first case the rule impedes and obstructs justice; in the second case it denies justice altogether. It is true that rules of procedure must be framed on general considerations, though they may work hardship in individual cases, and that when a rule is once established, those who practice the law must be assumed to be aware of it, and to frame their proceedings accordingly; but the rule ought to be such as can be acted upon, and a rule that upon a joint promise all partners must be sued jointly

cannot be acted upon by one who does not know of the existence of some of the parties liable, and then it becomes a trap and pitfall which the creditor has no means of escaping.

[Here follows a discussion as to the effect of the Judicature Act upon the doctrine of *King* v. *Hoare*, after which the opinion concludes as follows.]

I will not occupy your lordships' time by considering the view which ought to be taken as to the authorities in equity. I willingly adopt the opinion of those of my noble and learned friends who are more competent than I am to read those decisions aright; but for the reasons I have given I think that the judgment of the Court of Appeal ought to be reversed.

Lords HATHERLEY, O'HAGAN, SELBORNE, BLACKBURN and GORDON delivered opinions concurring with the Lord Chancellor.

Judgment affirmed.

In America, also, the common-law rule is generally considered to be that a judgment, though unsatisfied, against one of two merely joint (and not joint and several), debtors, is a bar to a subsequent suit against both on the same cause of action. The short reason being that the plaintiff in such action must show at the trial, an existing joint liability in *both* defendants, or he can prevail against *neither*. If, therefore, the plaintiff has by any act released or discharged one of such joint defendants from his original liability, he has, at common law, thereby released and discharged both. And a prior judgment against one, though still unsatisfied, has so far merged or extinguished the original cause of action, that no second suit can afterwards be maintained thereon against the same judgment debtor; and consequently cannot be brought against the same debtor and another jointly. This was abundantly settled in this country long before *King* v. *Hoare* arose in England in 1844. See *Ward* v. *Johnson*, 13 Mass. 148 (1816); *Willings* v. *Consequa*, 1 Peters C. C. 301 (1816); *Williams* v. *McFall*, 2 S. & R. 280 (1816); *Penny* v. *Martin*, 4 Johns. Ch. 566 (1820); *Robertson* v. *Smith*, 18 Johns. 459 (1821); *Smith* v. *Black*, 9 S. & R. 142 (1822); *Beltzhoover* v. *The Commonwealth*, 1 Watts 126 (1832); *Moale* v. *Hollins*, 11 Gill & J. 11 (1839); *Taylor* v. *Claypool*, 5 Blackf. 557 (1841); *Pierce* v. *Kearney*, 5 Hill 82 (1843); *Ward* v. *Motter*, 2 Rob. 536 (1843).

It is worthy of note that this question had arisen and been correctly decided in no less than ten different American tribunals before it had first presented itself for direct adjudication in the mother country. And the subsequent decisions have generally followed on the same side. *Wann* v. *McNulty*, 2 Gilm. 355 (1845); *Sloo* v. *Lea*, 18 Ohio 279 (1849); *How* v. *Kane*, 2 Chandl. 246 (1850); *Stearns* v. *Aguirre*, 6 Cal. 180 (1856); *Brown's Adm'r.* v. *Johnson*, 13 Gratt. 650 (1857); *Kingsley* v. *Davis*, 104 Mass. 178 (1870); *Cowley* v. *Patch*, 120 Mass. 137 (1876), and many other cases.

It is true the Supreme Court of the United States, in 1810, and while Chief Justice MARSHALL was at its head, made a contrary decision in *Sheehy* v. *Mandeville*, 6 Cranch 253; but it is equally true that this decision, though still followed in some states (*Watson* v. *Owens*, 1 Rich.

L. 113; *Union Bank* v. *Hodges*, 11 Id. 480; *Nichols* v. *Cheairs*, 4 Sneed 232, and perhaps others), has been not only generally disapproved in the state courts, but has also been finally overruled in the same tribunal which pronounced it. See *Mason* v. *Eldred*, 6 Wall. 236 (1867).

The same result follows in wholly separate suits; for, if a creditor recovers judgment separately against one joint debtor, as one partner in a firm, all being known, he cannot subsequently sue the other joint debtor *separately*; for the original cause of action is discharged. *Benson* v. *Paine*, 2 Hilt. 552; *Peters* v. *Sanford*, 1 Den. 224; *Nicklaus* v. *Roach*, 3 Ind. 78; *Olmstead* v. *Webster*, 4 Seld. 413; *Pierce* v. *Kearney*, 5 Hill 82.

But, of course, if debtors are jointly and *severally* liable, an unsatisfied judgment against one is no bar to a subsequent action against the other, notwithstanding some decisions to the contrary.

By suing one separately, the creditor makes no election not to sue the others separately. But the converse is not equally true. For if a debt be joint as well as several, a creditor who recovers judgment against *both jointly*, cannot, as some think, afterwards sue either one separately, although his first judgment is unsatisfied, for he has made his election to consider his contract joint and not several. *Downey* v. *Farmers' Bank*, *&c.*, 13 S. & R. 288. And if he first recovers judgment against one separately he can not afterwards sue the whole jointly. *Bangor Bank* v. *Treat*, 6 Greenl. 207; Yelv. 26; 1 Saund. 291*f*; 3 P. Wms. 405. And as he cannot have both a joint judgment against all, and also a separate judgment against each, it seems more exact to call his contract joint or several, rather than joint *and* several. But see *Trafton* v. *United States*, 3 Story 646; *United States* v. *Cushman*, 2 Sumn. 426.

Thus far we have been speaking of actions on contracts. In England, however, even in actions of tort, a prior judgment against one of two joint tort-feasors, though unsatisfied, is held to be a bar to a subsequent suit against the other; *Broome* v. *Wooton*, Yelv. 67; *Buckland* v. *Johnson*, 15 C. B. 145; *Brinsmead* v. *Harrison*, L. R., 6 C. P. 584 (1871).

But this is undoubtedly contrary to the American law, and contrary to principle. *Lovejoy* v. *Murray*, 3 Wall. 1; *Livingston* v. *Bishop*, 1 Johns. 290; *Sheldon* v. *Kibbe*, 3 Conn. 214; *Sanderson* v. *Caldwell*, 2 Aik. 195; *Elliot* v. *Porter*, 5 Dana 299; *Knott* v. *Cunningham*, 2 Sneed 204; *Page* v. *Freeman*, 19 Mo. 421.

The decisions of *Hunt* v. *Bates*, 7 R. I. 217, and *Wilkes* v. *Jackson*, 2 Hen. & Munf. 355, following *Broome* v. *Wooton*, are clearly wrong.

However, even in actions of tort, if a plaintiff recover judgment *and satisfaction* against one of two joint wrongdoers, he can no longer prosecute a suit against the other, even for nominal damages and costs; and notwithstanding the last suit was commenced at the same time as, or even before, the other. *Savage* v. *Stevens*, 128 Mass. 254 (1880); *Mitchell* v. *Libbey*, 33 Me. 74 (1851); *Ayer* v. *Ashmead*, 31 Conn. 447 (1863). For in this respect judgment and satisfaction by one wrongdoer extinguishes the cause of action against the whole, as much as a voluntary release under seal of one tort-feasor would do.

Whether the same result follows in actions upon contracts is not universally agreed. Some courts hold that if two separate actions be commenced at the same time, against parties severally liable for the same debt—as the maker and endorser of a note, for instance—and the plaintiff takes judgment *and satisfaction* against one, he cannot prosecute his suit against the other, even for nominal damages and costs. *Gilmore* v. *Carr*, 2 Mass. 171 (1806); *Farwell* v. *Hilliard*, 3 N. H. 318 (1825); *Maine Bank* v. *Osborn*, 13 Me. 49 (1836); *Foster* v. *Buffum*, 20 Id. 124 (1841).

On the other hand it is frequently held that the plaintiff in such case, having

rightly commenced more than one suit, and rightly incurred costs in both, may rightfully recover the same of the several parties originally liable for the debt and costs. Perhaps this should strictly be limited to costs accruing before satisfaction was received of other parties.

EDMUND H. BENNETT.

RECENT AMERICAN DECISIONS.

United States Circuit Court, District of Indiana.

W. G. FARGO, PRESIDENT OF THE AMERICAN EXPRESS CO., v. LOUISVILLE, NEW ALBANY AND CHICAGO RAILWAY CO.

For purposes of Federal jurisdiction, a corporation is a citizen of the state creating it, and no averment of the individual citizenship of its members will be permitted.

A joint stock company, under the laws of New York, possessing the right to sue n the name of its president, who is individually a citizen of New York, and having various other essential qualities of a corporation, is a citizen of New York for the purposes of jurisdiction; and a suit by its president may be sustained in a federal court, although some of its members are citizens of the same state as the defendant.

It is only by comity that a corporation created by one state can sue in its own name in another, and the reasons for such comity apply equally to the case of a joint stock company.

BILL in equity brought by William G. Fargo, a citizen of the state of New York, individually and as president of the American Express Company, against the Louisville, New Albany and Chicago Railway Company for an injunction, and other relief.

The respondents moved to quash for want of jurisdiction.

Isaac Caldwell and *E. F. Trabue*, of Louisville, for the motion.—The American Express Company, not being a corporation, cannot sue as one in its corporate name, or by its president. *Louisville Railroad Co.* v. *Letson* 2 How. 497; *Marshall* v. *B. & O. Railroad Co.* 16 How. 314; *O. & M. Railroad Co.* v. *Wheeler*, 1 Black 286.

All shareholders must, therefore, be citizens of other states than Indiana: *Hope Ins. Co.* v. *Boardman*, 5 Cranch 57; *Bank of U. S.* v. *Deveaux*, 5 Id. 85; *Breithaupt* v. *Bank of Georgia*, 1 Pet. 238; *Bank of Cumberland* v. *Willis*, 3 Sumn. 472; *North River Co.* v. *Hoffman*, 5 Johns. Ch. 300; *Bank of Vicksburg* v. *Slocomb*, 14 Pet. 60; *Whitney* v. *Mayo*, 15 Ills. 254; *Baldwin* v. *Lawrence*, 2 Simon & Stuart 18; *Leigh* v. *Thomas*, 2 Vesey,